Petition

81-214

No.

Office Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD ALLEN WAKEFIELD, PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

IS IT A VIOLATION OF DUE PROCESS OF LAW TO ADMIT INTO EVIDENCE IN A CONSPIRACY TRIAL CONTRABAND SEIZED FROM A PERSON WHO WAS NOT A CO-DEFENDANT NOR A CO-CONSPIRATOR?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now comes RICHARD ALLEN WAKEFIELD, Petitioner, by his attorney CLARENCE M. BRADFIELD, and prays that a Writ of Certiorari issue to review the Judgment of the United States Sixth Circuit Court Of Appeals entered in the above entitled cause on April 24, 1981, Petition for Rehearing en banc denied June 9, 1981.

OPINION BELOW

The United States Sixth Circuit Court Of Appeals affirmed the Petitioner's conviction on direct appeal on December 30, 1977. This opinion is appended as appendix A. A motion to vacate sentence pursuant to 28 U.S.C. 2255 was filed in the Trial Court and a written opinion was issued by the Trial

Court on August 12, 1980. This order is appended as appendix B. The matter was then appealed to the United States Court Of Appeals for the Sixth Circuit, and the judgment of conviction was affirmed on April 24, 1981. This order is appended as appendix C. A suggestion for rehearing en banc was then filed, and it was denied on June 9, 1981. This order is appended as appendix D.

STATEMENT OF JURISDICTION

The Jurisdiction of the Court is invoked under 28 U.S.C.A. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

Petitioner-Appellant, Richard Allen Wakefield, is currently confined at the United State Penitentiary, Leavenworth, Kansas, hereby appeals from an order denying his motion to vacate sentence pursuant to 28 U.S.C. 2255.

Following a jury trial Petitioner-Appellant was convicted of conspiracy to import and distribute heroin in violation of 21 U.S.C. sections 841(a)(1), 846 952(a), and 966 and sentenced to a fifteen years and a special parole term.

The Petitioner-Appellant appealed his conviction to the Sixth Circuit Court Of Appeals and the judgment of the District Court was affirmed on December 30, 1977.

On May 14, 1980 the Petitioner-Appellant filed a motion to vacate sentence pursuant to 28 U.S.C. section 2255, and on August 12, 1980 the District Court entered an order setting aside the special parole term, pursuant to *Bifulco v. United States*, 447 U.S. (1980). and otherwise denied the motion to vacate sentence. On May 2, 1975, David Bledsoe was arrested by United States Customs Inspectors in San Francisco, California after he was discovered in possession of approximately three pounds of heroin. Bledsoe was passing through customs upon his return from Bangkok Thailand. Since Bledsoe's address was Detroit, Michigan, a Federal Agent in San Francisco telephoned special Agent Markonni in Detroit, about 2:00 P.M. the same day to request a criminal record check and any information that might be obtained from Spickerman Travel Service in St. Clair Shores, Michigan where, Markonni was advised, Bledsoe's ticket showed it had been purchased. Agent Markonni questioned Mr. Rauof Matta of that Travel Service, and learned from him that Bledsoe was one of a party of four individuals, the others being Richard Wakefield, Horace Wright and Ricky Lowe, who had been ticketed together for departure from Detroit on April 23, 1975 on United Airlines Flight No. 89 to San Francisco, with continuing reservations on the same date on Pan American Flight No. 1 to Bangkok, Thailand, and return reservations departing Bangkok on April 27, 1975. Agent Markonni then checked United passenger list for the incoming flight no. 86 to determine whether any of the other three persons ticketed with

Bledsoe were aboard that flight and discovered the name "H. Wright." The flight was then in the air on its way to Detroit. Markonni called customs in Detroit and requested that a dog handler and a dog trained to detect narcotics be sent to Detroit Metropolitan Airport where the non-stop flight would land. When flight No. 86 arrived in Detroit that evening, Agent Markonni and Detective Kakalis boarded the plane. Having ascertained from United Airlines that an "H. Wright." occupied seat 34B they approached the individual and asked him his name. When he replied "Horace Wright" he was asked to step to the rear of the plane. Horace Wright was directed to go to the security office in the airport, and advised that he was being detained because he was suspected of trafficking in narcotics. Wright was asked if he would consent to a search of his baggage and he refused. Markonni then performed a search of Wright and found 26.5 grams of suspected marijuana. About 8:15 P.M. the customs dogs trained in narcotic detection were brought to the office and responded positively to one of Wright's suitcases. Agent Markonni thereupon searched that suitcase and found 198.3 grams of suspected heroin.

Kirby David Bledsoe was indicted in the District Court in California to the Federal Court in Detroit, Michigan under Rule 21(b) of the Federal Rules of Criminal Procedure.

Subsequently, Kirby David Bledsoe was indicted in the Eastern District of Michigan, Southern Division on a charge of conspiracy to import and distribute heroin, in violation of section 963 and 846, title 21 United States Code. Other Defendants and Co-Conspirators named in the indictment were Richard Wakefield, Horace Wright, Ricky Lowe, William Young, Sherrie Diggs and Tassie McDaniels.

On February 19, 1976, the government moved to dismiss the indictment against Kirby Bledsoe. The case proceeded to

trial on February 20, 1976, against Defendants Wakefield, Wright, Young and Lowe.

On March 10, 1976, Kirby David Bledsoe testified at the trial, after being called as a witness by the prosecution. Mr. Bledsoe testified that he was a Defendant in the case of *U.S.A. vs. Wakefield*, et al. and that the case against him had been dismissed. Bledsoe testified that he had known Wakefield for approximately five years, and further, that it was Bledsoe's idea to go to Thailand to film a documentary for a television show he owned. That prior to leaving Detroit to go to Thailand, Bledsoe leased some television camera equipment, and that he and Mr. Wakefield left Detroit on April 24, 1975.

On April 25, 1975, Kirby Bledsoe and Richard Wakefield arrived in Thailand and their baggage was checked prior to entering Thailand, and after entering the country they proceeded to a hotel and they each registered in separate rooms. Kirby Bledsoe and Richard Wakefield testified that he had no knowledge of Wakefield ever having gone into his room when he was not there.

On May 1, 1975, at approximately 8:00 A.M. Bledsoe prepared his luggage and equipment to be shipped from Thailand. Mr. Bledsoe arrived at the airport in Thailand on the morning of May 1, 1975 and the Customs Agents searched his luggage including the television camera case prior to shipment, and when Bledsoe got on the airplane, Wakefield was already on the aircraft.

On May 2, 1975, as Kirby Bledsoe was deplaning at the San Francisco International Airport he was arrested in possession of approximately three pounds of heroin found in his camera case, he stated that he did not put the substance into the case, and that he had no knowledge of its existence, and that he never agreed with anyone to smuggle drugs into the United States.

On March 17, 1976, the witness Kirby Bledsoe was called to testify again on behalf of Defendant, William Young. Bledsoe testified that he had formed an opinion that either his cab driver or one of the Rico brothers that he met in Thailand had put the drugs in his case.

At the trial, evidence seized from Kirby Bledsoe was admitted into evidence at the trial over the objection of Petitioner-Appellant.

Statements of Co-Conspirators are admissible against all Defendants *proven* to be *members* of the conspiracy where such statements are made during the course of, and in furtherance of the objectives of, a conspiracy, *Krulewitch v. United States*, 336 U.S. 440, 443 (1949); *United States v. Etheridge*, 424 F.2d 951 (6th Cir. 1970). The Petitioner contends *the same should apply to admissible evidence.*

Rule 801(d)(2)(E), Federal Rules of Evidence, says "A statement is not hearsay if the statement is offered against a party and is . . . a statement by a Co-Conspirator of a party *during the course* and in furtherance of the conspiracy."

The Co-Conspirator exception requires that the statement offered against a party be made (1) by a Co-Conspirator of a party, (2) during the course and (3) *in furtherance of the conspiracy.*

Hence, before a statement can be admitted as a Co-Conspirator's statement, the trial judge must make a preliminary determination (a) that there was a conspiracy, (2) that the Defendant and the declarant are Co-Conspirators, (3) that the statement was made during the course of the conspiracy, and (4) that the statement was made in furtherance of the conspiracy.

These determinations are preliminary questions of fact governed by Rule 104. They are decided for admissibility

purposes solely by the Trial Judge — not the jury. *United States v. Enright*, 579 F.2d 980, 987 (6th Cir. 1978).

The Standard should be the same for the admissibility of the (evidence) contraband, and it is the Petitioner's contention.

In addition, each conspirator is responsible for the acts of his Co-Conspirators committed pursuant to and in furtherance of the conspiracy, even if the accused is not aware of the performance of those acts or the existence of the action. *United States v. Cimini*, 427 F.2d 129 (6th Cir. 1970), *cert, denied,* 400 U.S. 911, *reh, denied,* 400 U.S. 984, *United States v. Day*, 392 F.2d 192 (6th Cir. 1968), *cert, denied sub nom., McFarland v. United States.* The proofs at the trial must show that Kirby Bledsoe was a Co-Conspirator. The proofs at trial *did not* in any way show that he was a Co-Conspirator.

Therefore, the Trial Court was in error when the Court admitted in evidence at the Petitioner-Appellant's trial, contraband seized from Kirby Bledsoe. Petitioner argues that the Rule 104 was violated in this case because no nexus was shown between the contraband that Mr. Bledsoe was in possession of and the conspiracy charge that was being tried before the Court.

If the Judge decides that the requirements have been met for admissibility, the statement is admitted, but no special instructions are given to the jury regarding the preliminary facts.

In *Enright, supra* the court decided that Rule 104(a), Fed. R. Evid, is applicable to the preliminary question of the admissibility of Co-Conspirator out-of-court statements.

THIS RULE PROVIDES:

RULE 104 PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification

of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. (Emphasis added).

THE COURT IN ENRIGHT THEN SAID:

A determination under 104(a) is more demanding than a prima facie test and calls for the exercise of judicial fact finding responsibilities by the trial judge, responsibilities which require him to evaluate both credibility and the weight of the evidence. (579 F.2d 985).

By comparison let's analogize the admission of the evidence under Rule 104(a), and Rule 105.

QUOTING FROM SECTION B:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, (whether Bledsoe is a Co-Conspirator) the Court shall admit it upon or subject to, the instruction of evidence sufficient to support a finding of the fulfillment of the condition.

That being, Bledsoe was proven not to be a member of the conspiracy during the course of, and in furtherance of the objectives of the conspiracy. Rule 403.

Exclusion of relevant, evidence on grounds of prejudice, confusion, or waste of time.

In *U.S. v. Sall*, 116 F.2d 745 the Court held:

> . . (the) Government had burden to prove that the accused did with intent to defraud, aid, abet, counsel, command, induce or procure the removal, deposit, or concealment of the particular alcohol, and *it was insufficient merely to prove that he was a member* of conspiracy to manufacture illicit alcohol and that in the course of conspiracy the particular crimes *were committed* by *other conspirators*. (Emphasis added).

The basic reasons for the argument not to admit the evidence is that it was not legally permissible nor trustworthy enough to be permitted before a jury. Putting it another way, if there were doubts about its actual reliability, or admissibility and particularly if there were dangers that a jury might attach far greater importance to it than a judge might think proper, the evidence (Bledsoe's drugs) should have been ruled inadmissible.

The drugs seized from Bledsoe was legally his and unless contrary trustworthy testimony would lead a prudent rational man to a different conclusion it was not admissible.

The Petitioner-Appellant contends that prejudice resulted from the receipt into evidence of the drugs found in possession of Kirby Bledsoe. Further that the trial judge ignored the basic concepts of the conspiracy law and therefore denied Petitioner a right to a fair and impartial trial, and it violated due process to allow its admission

REASON FOR GRANTING THE WRIT

The Petitioner is requesting the United States Supreme Court to exercise its Rule making power in the area of Federal Law of evidence and to Curtail an attempt to broaden the already pervasive and widesweeping nets of conspiracy pro-

secutors. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L ed 2d. 213.

There is no legal reason why contraband in the possession of one Kirby Bledsoe, who is not a Defendant in this case, nor alleged to be a Conspirator, should be admissible evidence against the Petitioner.

CONCLUSION

The Petitioner hereby requests the Court to grant him a new trial.

Respectfully submitted,

CLARENCE M. BRADFIELD (P11098)
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(313) 535-2555

Dated: July 9, 1981

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished to Solicitor General, Department of Justice, Washington, D.C. 20530; Richard Rossman, U.S. Attorney, 817 Federal Building, Detroit, Michigan, by mail this 9th day of July, 1981.

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APPENDIX

ORDER

(Filed December 30, 1977)

NO. 77-5048
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

RICHARD ALLEN WAKEFIELD
Defendant-Appellant

Before: PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This appeal, perfected from a judgment entered on jury verdict finding defendant-appellant guilty of conspiracy to import heroin into the United States in violation of 18 U.S.C §§2 and 841, have been submitted on the record on appeal and on the briefs and oral arguments of counsel. The Court being fully advised in the premises having concluded that the indictment sufficiently charged the appellant of the crime of which he was convicted, that the district court did not abuse its discretion in denying his motion for severance and that the search warrant under which evidence was received at trial was validly issued,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By /s/ Grace Keller
Grace Keller, Chief Deputy

ISSUED AS MANDATE: January 31 1978
COSTS: None

OPINION AND ORDER
DENYING MOTION TO VACATE SENTENCE

(Filed August 12, 1980)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD ALLEN WAKEFIELD
Petitioner,

v.

DOCKET NO:
76-80269

UNITED STATES OF AMERICA
Respondent.

Following a jury trial petitioner was convicted of conspiracy to import and distribute heroin in violation of 21 U.S.C. §§841(a)(1), 846, 952(a), 960 and 963. He was sentenced to a fifteen year term of incarceration, a fine of $25,000, and a ten year special parole term. He has filed a motion to vacate sentence pursuant to 28 U.S.C. §§2255 raising five grounds:

1) that the search of his home was invalid;

2) that there is a variance between the conspiracy count as alleged in the indictment and the evidence produced at trial;

3) that the District Judge made no specific finding of defendant's connection to the conspiracy as required by *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978);

4) admitting evidence illegally seized from a co-conspirator;

5) that the imposition of a special parole term on a conspiracy count was invalid.

In view of the Supreme Court's decision in *Bifulco v. United States*, 447 U.S. ____ (1980), petitioner is entitled to relief on the last ground, and the judgment will be amended to delete the special parole term. Petitioner is not entitled to relief on any of the remaining grounds.

The lawfulness of the search of the petitioner's home was fully litigated at the trial of the case. A written opinion was filed denying the motion to suppress the evidence there seized. The issue was raised on direct appeal, was considered by the Sixth Circuit Court of Appeals, and the conviction was affirmed. (*See* Order of the United States Court of Appeals, dated 1/31/78).

The question of variance was not raised on direct appeal. A motion to vacate under 28 U.S.C. §2255 is not intended to be used as a substitute for a direct appeal. *United States v. O'Connor*, 298 F.2d 62 (6th Cir. 1962); *McDowell v. United States*, 336 F.2d 435 (6th Cir. 1964), *cert. denied*, 379 U.S. 980 (1965); *Petro v. United States*, 368 F.2d 807 (6th Cir. 1966); *DiPiazza v. United States*, 471 F.2d 719 (6th Cir. 1973); *United States v. Duhart*, 511 F.2d 7 (6th Cir. 1975), *cert. dismissed*, 421

U.S. 1006 (1975). *See also Sunal v. Large,* 332 U.S. 174 (1947). Moreover, this ground does not involve the jurisdiction of the trial court or any constitutional right of the petitioner, and therefore may not serve as the basis for a collateral attack upon a judgment of conviction under 28 U.S.C. §2255. *Hill v. United States*, 368 U.S. 424 (1962); *Kaufman v. United States*, 394 U.S. 217 (1969); *Petro v. United States*, 368 F.2d 807 (6th Cir. 1966). Finally, the evidence presented at trial permitted the jury to find that the petitioner was involved in the conspiracy alleged in the indictment.

This case was tried prior to *United States v. Enright, supra*; thus, the District Court did not apply the preponderance of evidence test directed by that opinion. The court did, however, make a finding that there was prima facie evidence and submitted to the jury an instruction similar to that given by the District Court in *Enright*. Although this circuit has not ruled directly on whether *Enright* should be applied retroactively, the court in *Enright* did not reverse the conviction for failure to use the preponderance of the evidence rule.

Since the instruction given in *Enright* and found acceptable in a pre-*Enright* type of setting was given in the instant case, and since this case was decided prior to *Enright*, this court declines to apply *Enright* retroactively. It may be noted that the Eighth Circuit, after also adopting the preponderance of the evidence standard, held that it would be applied prospectively. *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States v. Macklin*, 573 F.2d 1046, 1049 (8th Cir. 1978), *cert. denied*, 439 U.S. 852 (1978).

Petitioner also argues that evidence illegally seized from co-conspirator Horace Wright in an airport search could not be admitted into evidence against petitioner. This argument is clearly without merit.

> "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging

evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978).

For the foregoing reasons the motion to vacate sentence is denied except with respect to the special parole term.

/s/ CORNELIA G. KENNEDY
District Judge
(sitting by designation)

DATE: August 12, 1980
Detroit, Michigan.

ORDER

(Filed April 24, 1981)

NO. 80-1614
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD ALLEN WAKEFIELD
Petitioner-Appellant

v.

UNITED STATES OF AMERICA
Respondent-Appellee

Before: EDWARDS and WEICK, Circuit Judges and PHILLIPS, Senior Circuit Judge.

This appeal from an order of the district court denying appellant's motion to vacate sentence filed pursuant to 28 U.S.C. §2255 was heard on the briefs, record and arguments of counsel. He had been convicted by a jury of conspiracy to import and distribute heroin in violation of 21 U.S.C. §§841(a)(1), 846, 952(a) and 966. His conviction was affirmed by this court on direct appeal.

Appellant raises two issues on appeal, namely, the admission in evidence seized from conspirators, Bledsoe and Wright, the latter conviction having been reversed on the ground that there was an illegal arrest and seizure. There was an abundance of evidence of the conspiracy in which all of them had participated. Appellant has no standing to challenge the search of Wright's luggage.

The judgment of conviction is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER

(Entered June 9, 1981)

NO. 80-1614
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD ALLEN WAKEFIELD
Petitioner-Appellant

v.

UNITED STATES OF AMERICA
Respondent-Appellee

Before: EDWARDS and WEICK, Circuit Judges and PHILLIPS, Senior Circuit Judge.

No active judge of this court having requested that a vote be taken on the suggestion of petitioner for rehearing en banc, the case was referred to the panel for disposition.

Upon consideration, it is ordered that said suggestion for rehearing en banc be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk